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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 336.

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS.

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J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York, *Appellants,* against Sparkill Realty Corporation and Standard Trap Rock Corporation, *Appellees.*	No. 336.

On Appeal From the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR APPELLANTS.

I.

Replying to appellees' introductory statement (pp. 1-13).

Counsel say (appellees' brief, p. 2) that

> "in the absence of funds appropriated for the purpose, the State Constitution forbids payment of any judgment out of any funds in the State Treasury."

The Constitution of the State of New York contains no such prohibition, either express or implied. The statement is based on a complete misapprehension of the eminent domain power and the limitations imposed upon it by the New York Constitution, as authoritatively settled by the New York Court of Appeals (*infra*, pp. 10-13).

Counsel assert (appellees' brief, p. 2) that

> "The Conservation Law of New York has not been held void."

Nevertheless, the decree so recites (R., 82; and as to Section 59, see opinion, R., 94).

Counsel say (appellees' brief, p. 2) that

> "No statute of New York pledges or authorizes a pledge of the entire or any portion of the credit of the state to pay for property taken in eminent domain."

Yet this is exactly what Section 59 of the New York Conservation Law does. It provides (in subdivision 7)

that upon filing in the office of the Conservation Department and in the office of the Comptroller a certified copy of the judgment that the owner has recovered in the Court of Claims, with a certificate of the Attorney General showing that this judgment is final,

> "The comptroller *shall* issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount *shall* be paid out of the state treasury." (See appendix to our main brief, p. 26.)

This is not only a direction to the State Comptroller to issue his warrant and to the State Treasurer to make the payment, but a direction that the State itself pay the amount of the Court of Claims judgment. In *Sage* vs. *City of Brooklyn* (89 N. Y., 189, at 200-201) Chief Judge Andrews said:

> "According to common understanding, a direction to the chief financial officer of a city, State or of the general government, to pay money for a public purpose, is a direction that the State, government or municipality pay the sum stated."

It is also a promise on the part of the State to appropriate whatever moneys may be needed in the future to make payment possible. In *Newell* vs. *The People* (7 N. Y., 9) Johnson, J., said that while it is true that "payment cannot be made without further legislative action" (since "an appropriation is always necessary to effect actual payment"), nevertheless the state's "*obligation*

is as complete without the appropriation as with it'' (7 N. Y., at 104).*

Counsel assert (appellees' brief, p. 2) that

> "plaintiff lessee has constructed a stone-crushing plant on the property and stripped a portion of the quarry at a cost of more than one million ($1,000,000) dollars."

Appellees' references to the record—R., 40, 43, 44—show nothing to support the statement that any portion of the quarry has been "stripped." What does appear at R., 44 and elsewhere in the record (R., 44, 47, 48, 50, 53) is frequent reference to the *naturally* exposed face of the cliff, a characteristic feature of the rock formation of the Palisades.

Nor does the record purport to show that the actual "cost" of Standard Trap Rock Corporation's preparation has been $1,000,000. The allegations of the bill are merely that Standard Trap Rock Corporation had subjected itself to liability in excess of $1,000,000 (R., 6). There is nothing to show the actual indebtedness to its contractors at the time of the entry and appropriation. The mere fact that Standard Trap Rock Corporation was under contract to pay $1,000,000 for a finished plant by no means shows that it actually owed this amount when the State's interference terminated the construction contracts and rendered their completion impossible.

At page 4 appellees refer to "Section 761 of the new Conservation Law" as distinct from the sections of that

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*Judge Johnson here pointed out that even as to a funded debt ultimate *payment* depended upon an appropriation by the Legislature. But the obligation was complete and the payment a moral certainty.

As to the *Newell* case see *infra*, p. 14.

law that were taken over from the Palisades Park Act. As a matter of fact all the provisions concerning the Palisades Interstate Park are found in Part 9 of Article XVI of the 1928 Conservation Law, and Section 761 is merely the last section of Part 9 (see pp. 27-34 of appendix to main brief).

At pages 6-7 counsel attempt to make a showing of hardship from the abandonment of the first attempt to acquire the property and the partial erection of the quarry plant by Standard Trap Rock Corporation during the interval before October 10, 1928, when the property was taken by entry and appropriation. We have shown in our main brief (p. 7) the reason for the abandonment of the first attempt to acquire the property—the uncertainty then existing whether it was within the territorial jurisdiction of the Palisades Commission. (That it was the appellees' own attorney who had raised the objection, see R., 60.) We have also shown that there was given to appellees at that time no assurance that the Commission had permanently abandoned the idea of acquiring the property. On the contrary, the attorney for the Standard Trap Rock Corporation who telephoned to Mr. Richards and asked for some amplification of the notice that the condemnation project was abandoned, was told that Mr. Richards "could add nothing to what was stated in the letter *and that he could not predict what the Commission's future attitude would be*" (R., 60; main brief, p. 7).

Counsel refer (p. 7) to the circumstance that appellees "were served with a notice of resolution of the Board

of Commissioners of the Land Office requiring cessation of the dredging at the plant," and to the assertion of Mr. Shaw in his affidavit that "deponent is informed, believes and therefore alleges that this action was taken at the request of defendants, Board of Commissioners of Palisades Interstate Park, who had been informed of the plan for dredging eleven months prior and on or before September 20, 1927."

These references, wholly irrelevant to any issue here, apparently represent an attempt to impute impropriety either to the Land Board or to the Palisades Park Commission. The lands under water were the property of the State and the dredging was a trespass. The Land Board ordered the trespasser to desist. In view of the fact that the State was then contemplating the taking of the property by eminent domain, there was no reason why it should stand by and see the owners' exaggerated claim for damages further increased by the unauthorized dredging of the State's property.

Counsel fall into error both as to the law and the facts in their reference to the statement in Mr. White's affidavit (R., 58) that *among* the quarries which had been closed *before* 1921 by purchase or condemnation, were "quarries which—(unlike the one here that was never completed or operating)—were, at the time of their acquisition, going concerns that had been in operation for years and were earning large profits."

Because Mr. White said that some quarries operated prior to 1921 had made profits, this is construed (brief, p. 10, and again at pp. 70 and 80) as some evidence that this unopened quarry would make profits. But, as we have pointed out (see our main brief, pp. 60, 61) these

anticipated profits do not constitute the basis for determining the value of the land. Appellees could not recover for the loss of their quarry business, even if it were an established one, unless the State took the quarry business as well as the land. In *Mitchell* vs. *United States* (267 U. S., 341, cited in our main brief, at p. 60), Mr. Justice Brandeis said:

> "The settled rules of law, however, precluded his considering in that determination consequential damages for losses to their business, or for its destruction. *Joslin Manufacturing Co.* vs. *Providence*, 262 U. S., 668, 675. Compare *Sharp* vs. *United States*, 191 U. S., 341; *Campbell* vs. *United States*, 266 U. S., 368. No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."

Counsel assert that "the experience of the Commission in connection with the acquisition of other properties, including quarries, does not qualify its members as experts"; that the estimate put upon the property by Mr. White personally and by the Commission as a whole is merely the "conclusion of a party" and that the allegations of value contained in the bill therefore remained uncontroverted (appellees' brief, pp. 9-11).

The rule of law is however to the contrary. Experience in estimating the values of property in a particular locality acquired by a public official in the course of his

official duties, does qualify him to testify as an expert to the value of such property.

Wigmore (2d ed.), Sections 711, et seq.;
Nichols, *Eminent Domain,* §448 (as to public officials, see p. 1177);
Benedict vs. *United States,* 270 Fed., 267, 269, aff'd 271 Fed., 714, aff'd 261 U. S., 294;
Muskeget Island Club vs. *Nantucket,* 185 Mass., 303.

On page 12 of their brief counsel say that obtaining the $600,000 allocation out of the 1924 bond issue money, was a "recognition," by the Palisades Interstate Park Commission "of the necessity under any power for an antecedent appropriation of moneys sufficient to pay an award."

What happened was this:

If the Commissioners desired to use bond moneys to pay for the property, they were required by the 1926 appropriation law (Section 4—see appendix to main brief, p. 48) to obtain the approval of the Governor, the Chairmen of the two financial committees of the Legislature and the State Council of Parks, for the acquisition of this land. They did obtain this approval (R., 54).

They were also required by Section 8 of the same law (see appendix to main brief, p. 51) to obtain from these officials a certification to the State Comptroller of the estimated amount required for the acquisition. They did obtain this certificate of the estimated amount (R., 55),—and that is the allocation referred to.

On no possible theory can this compliance with *statutory* rules be construed as a recognition of any *constitutional* requirement.

II.

Replying to Point I of appellees' brief (pp. 14-20).

Appellees in their first point quote the referendum provision of the New York Constitution (Art. VII, §4)* and the provision requiring appropriation by the Legislature before State funds can be paid out (Art. III, §21) and they cite various cases concerned with the interpretation and application of these provisions (appellees' brief, pp. 14-18) as if some restriction or limitation upon the State's power of eminent domain were to be found there.

The *appropriation* provision has nothing to do with the eminent domain power—it simply prescribes that before any money belonging to the State shall be actually paid out the legislature must appropriate it for the purpose for which it is to be paid. *It imposes no limit upon the power or the duty of the legislature to appropriate moneys from the State Treasury to pay Court of Claims judgments* (main brief, pp. 36-37).

And the *referendum* provision has nothing to do with the eminent domain power and imposes no restriction upon it. It has to do solely with the borrowing of money upon the credit of the State or upon the pledge and security of its future revenues, and this section has always been recognized by the New York courts as restricting the creation of debts in this sense and in this sense only.

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*Counsel say we have not printed the whole of this section in the appendix to our main brief. They are mistaken. An amendment submitted to the people in 1920 (effective January 1, 1921) eliminated the part which counsel think we failed to print, and made other changes.

People vs. *Adirondack Railway Co.* (160 N. Y., 225) dispels any idea that the appropriation and referendum clauses have anything to do with the eminent domain power. Judge Vann, in his great opinion fully discussed the State's right of eminent domain as one of the inherent and essential prerogatives of sovereignty, and established beyond any possibility of doubt that the New York Constitution imposes no restriction or limitation upon the exercise of that sovereign power by the State except the requirements of just compensation and due process. Judge Vann said (160 N. Y., at 236-239, 241):

> "The power of taxation, the police power and the power of eminent domain, underlie the Constitution and rest upon necessity, because there can be no effective government without them. They are not conferred by the Constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the Constitution, they exist independently of it as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself. (Black Cons. Law, §123; Cooley Const. Lim., 524; Eminent Domain by Randolph, 77; Lewis, §3; Mills, §11.) Each is a peculiar power wholly independent of the others, and not one of them requires the intervention of a court for effective action by the state. In the case of eminent domain, when the state is not itself an actor, compensation for property taken, unless the amount is

agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary except as provided by statute. (State Const., art. 1, §7.)

"The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation. The state has all the power of eminent domain there is and all that any sovereign has subject to the limitations of the Constitution. Although exercised under our first Constitution, it is not mentioned therein, and it is now mentioned only for the purpose of limitation. The language of the Revised Constitution is as follows: 'No person * * * shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation'; and 'when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.' (Const., art. 1, §§6 and 7.) This language, which presupposes the existence of the power outside of the Constitution, simply regulates the right to use it. It does not confer the power, but recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the state acts for itself, but marks out certain boundaries which may not be crossed, even by the state. Within those boundaries, the state, acting through that department which exerts the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with

by either of the other departments of government. (*Garrison* vs. *City of New York*, 88 U. S., 196.) All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent. (*People* vs. *Kerr*, 27 N. Y., 188; *Matter of the City of Buffalo*, 68 N. Y., 167.) While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor. *There is no limitation upon the exercise of the power except that the use must be public, compensation must be made and due process of law observed.* (*Secombe* vs. *R. R. Co.*, 90 U. S., 108; *Matter of Fowler*, 53 N. Y., 60, 62.)*

"Now, what does the phrase 'due process of law' mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? * * * In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the state has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where of necessity, if there is any action at all, it must be arbitrary. The state needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public

*Our italics.

authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state unless some statute requires it. (*Matter of Village of Middletown*, 82 N. Y., 196, 201.) There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the Constitution."

Addressing himself specifically to the just compensation and due process requirement, Judge Vann went on to say (at 241):

"Just compensation, to be ascertained in the absence of agreement by an impartial tribunal, is an absolute right belonging to the owner of the property taken, but it is not necessary to provide for payment in advance, if a certain, convenient and adequate source and means of payment is provided. A distinction is made between direct action by the

state and action under power delegated to a corporation created by the state, as the one is presumed to be solvent while the other is not. Where, as in this case, the treasury of the state is pledged to meet the claim, payment need not be concurrent with the taking. (*Matter of Mayor, etc.*, 99 N. Y., 569.)"

Incoherent quotations from *Newell* vs. *The People*, 7 N. Y., 9; *People of New York* vs. *Canal Board*, 55 N. Y., 390; and *People ex rel. Hopkins* vs. *Board of Supervisors*, 52 N. Y., 556, at pages 16-18 of appellees' brief only serve to reveal still further counsel's failure to distinguish between the provisions of the New York Constitution with respect to the appropriation of public money, with respect to the creation of floating debts, and with respect to the eminent domain power.

Newell vs. *The People* seems to be relied upon because it held that the provisions of chapter 485 of the New York Laws of 1851* constituted altogether a "single scheme for raising money on the faith of which capital is invited to assist the State" (Opinion of Johnson, J., p. 106), and that, having no referendum provision, it violated the referendum requirement of the New York Constitution (now article VII, §4, of the present constitution).**

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*"An Act to provide for the completion of the Erie Canal enlargement and the Genesee Valley and Black River Canals."

**The passages quoted in appellees' brief (pp. 16-17) are concerned with the attempt in the final section of the act to evade the constitutional requirement of a referendum by the provision that the "state shall in no event be liable to make up any deficiency of revenue, or to redeem the canal revenue certificates in any other manner than out of the canal revenues of the state" and further that "the certificates to be issued under this act shall in no event or contingency be so construed as to create any

(*Footnote continued on next page.*)

People of New York vs. *Canal Board* has no more to do with the eminent domain power than the *Newell* case. The action there brought by the attorney-general was to enjoin the Canal Board and a contractor who had done work on the canal from proceeding (under chapter 740 of the Laws of 1872) to inquire whether the cost of the work done had exceeded the prices paid, and if so what the difference was. It was held that the action could not be maintained, the Court of Appeals being of the opinion that the statute was constitutional (55 N. Y., at 400), and also that, regardless of the constitutional question, it would not lie, because the bill presented only "a theoretical or speculative question, which, whatever its merits, can only be judicially decided when facts arise giving the court jurisdiction, and making a decision necessary" (55 N. Y., at 397).

People ex rel. Hopkins vs. *Board of Supervisors*, likewise has nothing to do with any question of eminent domain. There Chapter 700 of the New York Laws of 1872 was held unconstitutional because (1) it made appropriations, yet failed to comply with the requirement of the State constitution (now article III, section 21), that every appropriation law shall "distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum," and (2) it contained a section authorizing the creation of a state debt to pay the appropriations made, which were for a

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(*Footnote continued from p.* 14.)

debt or liability against the state or the people thereof within the meaning of" the referendum requirement of the state constitution (7 N. Y., at 18).

The three judges who wrote for the majority of the Court of Appeals all agreed in allowing these evasive provisions no legal effect (pp. 93; 106-7; 115, 116 and 119) and in holding that the statute did create a debt within the meaning of the referendum provision (pp. 87; 92; 102-5; 115-6).

great variety of purposes, and so failed to comply with the requirement of the referendum provision that a law creating a State debt shall be for a "single work or object, to be distinctly specified therein" (see art. VII, §4, appendix to main brief, p. 5). As to this case see *infra*, pp. 35-36).

After quoting from these utterly irrelevant cases, counsel then go on to assert (appellees' brief, p. 19) that

> "the cases cited establish that neither the legislature nor the officers and agents of the State, or all combined can pledge its credit."

The exact contrary is true where the eminent domain power is involved.

More than a century ago, as we know, Chancellor Kent laid it down as a fundamental proposition (*Rogers* vs. *Bradshaw*, 20 Johns., 735, at 744-5) that whenever "a public officer enters upon private property *by virtue of legislative authority,*" the owner's constitutional right to compensation "*imposes it as an absolute duty upon the legislature to make provision for compensation.*" In a later decision of the same year—1823—Chancellor Kent reasserted the power of state officials acting within the scope of their authority to pledge the state's credit and impose upon the legislature the duty to provide just compensation for those whose property has been taken pursuant to an exercise of official power which the legislature has authorized (*Jerome* vs. *Ross*, 7 Johns. Ch., 315, 344):

> "If the owner is paid for the damage occasioned by the temporary use of his lands, it is all that he can justly require, and this compensation the state

is bound to give him. If the act we are examining has omitted to make any provision for the assessment and payment of damages for such temporary use, it may have escaped the attention of the legislature, or the case may have been deemed, at the time, immaterial and unimportant. The omission, however, if it be one, does not prevent the right of the commissioners to enter and use the land; nor prevent the just claim of the owner upon the commissioners or the legislature for his reasonable compensation. The commissioners are not trespassers, when the act authorizes them to enter, if they enter before the damages are paid for. This was so understood and declared, in *Rogers* vs. *Bradshaw*, already referred to. The claim for compensation arises after the use has been had; and the damages cannot well be assessed before they have arisen. Whatever, therefore, may be the better construction as to the mode of ascertaining and enforcing the compensation it does not affect the right of the commissioners to enter, nor justify the interference of a Court of equity to interdict their entry."

And a century later the Court of Appeals in both its *Pauchogue* opinions (243 N. Y., 15, cited and applied in 248 N. Y., 635) reasserted this view. Although the statute authorizing the Long Island Commission to exercise the eminent domain power by entry and appropriation imposed the condition that there first be moneys on hand or appropriated, it was declared that if the officials acted in good faith in deciding that the funds on hand were sufficient, *the entry and appropriation would be valid and binding even though it later turned out that they were mistaken and that the property was worth more than the amount on hand.* In that event, *"the credit of the State may be pledged to meet the deficiency"* (243 N. Y., at 27).

Thus it is only by reading the New York decisions upon clauses of the New York Constitution which have nothing to do with the eminent domain power, that appellees' counsel are able to make the assertion that neither the legislature nor the officers of the state can pledge its credit, to pay for property which it takes and uses.*

Counsel say that in the first *Pauchogue* decision (243 N. Y., 15) the Court of Appeals "recognizes that no money can be paid out of the treasury of the state or any funds under its management except in pursuance of an appropriation by law (Section 21, Article III)." This reference to the appropriation provision in the State constitution was made in discussing the question whether the bond issue act of 1924 had by itself—and without further legislation—put at the disposal of the Long Island Commission the $1,000,000 fund which it provided for the use of that commission. (As that enactment itself declared that the bond issue moneys were to become available only "after appropriation by the legislature" [L., 1924, Chap. 602, §3; appendix, p. 37], the Court of Appeals held against the Commission, citing also the constitutional provision.)

Nowhere in Judge Pound's opinion was it remotely suggested that Article III, Section 21, operated as a limitation on the power of public officials to pledge the State's credit for property taken. On the contrary the opinion in so many words establishes that there was no

*The Pauchogue Land Corporation both in its two appeals to the Court of Appeals and in its certiorari application to this Court urged that Article III, Section 21 and Article VII, Section 4 qualified the pledge of the State's general credit given by Section 59, and cited many of the same decisions appearing in appellees' brief (see especially the statement of points appearing in the opinion in 243 N. Y., 15).

constitutional limitation upon the Long Island State Park Commission (main brief, pp. 73-74).

Counsel say (appellees' brief, pp. 19-20) that in the *Pauchogue* case (243 N. Y., at 23) Judge Pound commented upon the "danger" of the eminent domain power. The comment was not, however, any part of Judge Pound's discussion of the constitutional question. It was incident to the inquiry whether the eminent domain power, in its full constitutional scope, had been conferred upon the Long Island Commission, or whether that power was conditioned and restricted by the terms of the Long Island Park Act.

With the question why the Legislature imposed upon the Long Island Commission a limitation to "moneys on hand or appropriated" while it imposed no such limitation upon the Palisades Commission, this Court has nothing to do,—though it may be reiterated that the Palisades Commission is the only *interstate* commission, and it may be added that the area within which it can exercise its eminent domain power is strictly defined by the natural features sought to be preserved (appendix, pp. 29-30). It is sufficient, then, simply to re-assert that in every instance where the Legislature has imposed upon any of the park commissions a limitation to funds available, it did so in express language in the act creating that commission,—language now appearing in the Conservation Law.*

*See, for example, as to the Long Island State Park Commission, Conservation Law, Section 777, quoted in our main brief, page 32; as to the Allegany Commission, §692; as to the Taconic Commission, §737.

III.

Replying to Point II of appellees' brief (pp. 20-40).

Counsel say (appellees' brief, p. 20) that

> "The phrase 'pledge of general credit' arose when statutes were first enacted which vested title to land taken in eminent domain prior to actual payment of compensation. *It was soon established in New York under its constitution that such a pledge must amount to a lien upon a specific fund antecedently appropriated.*"

Here again the confusion between the constitutional provisions regulating funded debts of the State, and the State's right of eminent domain, is complete, as the immediate reference to "the cases cited in Point I, *supra*," confesses. For those cases, as we have seen, had to do with the interpretation and application of the provisions of the New York Constitution now found in Article VII, §4, not at all with the eminent domain power.

Counsel cite (appellees' brief, pp. 20-22) the well-known case of *Sage* vs. *Brooklyn*, 89 N. Y., 189, as authority for this supposed constitutional requirement of "a lien upon a specific fund antecedently appropriated." The case held just the opposite:

The property there in question had been taken under a statute which provided for the widening of a street, the appointment of commissioners to estimate the expense and the damage of the land owners, and to apportion and assess the same upon the property benefitted. Payment of the commissioners' award to the plaintiff was refused by the city treasurer on the ground that the fund derived from the assessments collected had been exhausted by claims previously presented. Plaintiff

then brought this action against the City of Brooklyn "to recover the award, as a debt owing by the defendant" (89 N. Y., at 194), and had judgment which the General Term and the Court of Appeals affirmed. Chief Judge Andrews, writing for the Court of Appeals, held the direction contained in the statute "that the comptroller shall pay the land damages," to be "absolute and unqualified," (not merely "a direction to pay them out of the assessments when collected or out of a particular fund" [199]), and a direction by the State Legislature to the City to pay the amount of the award which the City was bound to obey. He said (p. 201):

> "The duty of payment imposed by the act of 1868, is a corporate duty, and one from which the city can be relieved only by performance."

The case therefore is far from holding what appellees cite it for—that "the pledge [of the State's credit] must be enforceable against an existing fund" and if the "existing fund" is inadequate the appropriation is invalid. What it held was, on the contrary, that although the fund that was expected to afford compensation had proved insufficient, nevertheless the owner was entitled to full compensation, and the city was obliged to pay full compensation.

Litchfield vs. *Bond* (186 N. Y., 66) is cited and quoted (appellees' brief, pp. 22-3), but is not at all in point. The defendants there—the state engineer and his assistants—entered upon plaintiff's forest land and cut the trees on a strip more than three miles long and from three to eight feet wide (p. 71), and were threatening to continue the devastation. In the action brought to enjoin

them they pleaded that they were acting under the authority of the law providing for a survey of county boundary lines then in dispute. Werner, J., said that if their acts went "beyond the necessary incidents of a governmental survey" so that they involved "the taking of plaintiff's private property for an alleged public use, the state is liable if the taking is authorized by its legislative direction," while on the other hand "the trespassers are liable if there is no such authority." Examination of the statute showed the existence of no such authority,—

> "Even under the most liberal reading of the statute now under consideration (L., 1902, ch. 473) it is impossible to find in it a single word or sentence indicating that the state proposed to exercise its right of eminent domain or to make compensation for private property taken or destroyed."

In arguing against the entry and appropriation practice and its use by the Palisades Commission under Section 761 of the Conservation Law, counsel point with approval (pp. 24-5) to a provision formerly contained in Section 24 of the New York Condemnation Law. The provision thus commended is a provision which used to impose upon the condemnor in New York—if he wished to take possession in advance of the determination and payment of compensation—the duty of "depositing with the court the sum stated in the [landowner's] answer as the value of the property." As a matter of fact the New York Condemnation Law no longer gives the landowner any such right to demand an exorbitant deposit. Section 24 was amended in 1923 and this provision—which appellees mistakenly regard as still in effect—

eliminated. The present requirement is simply that the court shall determine the amount of the deposit upon notice to the parties.*

Counsel say (appellees' brief, p. 25) that the Adirondack Park Act was held to be constitutional because of a $600,000 appropriation which that statute originally carried. It was while this appropriation was in effect that the Appellate Division of the New York Supreme Court held the statute invalid (39 App. Div., 34), and it was after the original appropriation had lapsed (N. Y. Constitution, Art. III, §21) that the Court of Appeals and this Court declared it valid, and valid without any

*This section of the Condemnation Law in its present form (N. Y. L., 1920, ch. 923, §24, as amended by L., 1923, ch. 246) is as follows:

> "When it appears to the satisfaction of the court at any stage of proceedings that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, *upon the deposit with the court of a sum to be fixed by the court* upon a notice to the parties of not less than eight days and such sum when so fixed and paid shall be applied, so far as it may be necessary for that purpose, to the payment of any award that may be made, with interest thereon from the date of the entry of the petitioner upon such real property, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceedings, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant."

inquiry whether there had been a reappropriation or whether or not it had been exhausted in the acquisition of other lands.

Both Judge Vann's decision in the Court of Appeals (160 N. Y., 225) and Chief Justice Fuller's decision in this Court (176 U. S., 335) went upon the simple ground:

> "This act fulfills these requirements [of due process] in that the state treasury is the source of payment" (176 U. S., at p. 350; main brief, pp. 23-24; 72-73).

Counsel (appellees' brief, pp. 23-4) refer to cases where compensation was assured by a right of action against a city or a private corporation, against which execution can issue (*Sweet* vs. *Rechel*, 159 U. S., 380; see appellees' brief, pp. 23-24, and *Matter of App'n of Mayor, etc., of the City of N. Y.*, 99 N. Y., 569).

But the certainty of payment when the general credit of the State is pledged and an action in the State Court of Claims permitted is no less than where execution can issue against a municipal or other corporation. For the presumption "that the State will keep its faith inviolate and honestly fulfil all its obligations" (*Talbot* vs. *Hudson*, 82 Mass., 417, 432) is the completest possible assurance that the judgment against the State will be paid (and see other cases cited in our main brief, pp. 45-7).

And this Court in so many words has declared that the rule is the same, whether the taking is "by a State or one of its municipalities" (*Joslin* vs. *Providence*, 262 U. S., 677; *Adirondack Ry. Co.* vs. *New York*, 176 U. S., at 349-50).

Appellees try to distinguish *Hays* vs. *Port of Seattle* (251 U. S., 233) on the ground that the property taken

in that case was not land, but a right of contract. But the destruction of the contract right was a "taking" of property and this was recognized in the decision. Mr. Justice Pitney said:

> "Assuming he had property rights and that they were taken, it clearly was done for a public purpose, and there was adequate provision for compensation * * * * * * this statute constitutes an adequate provision for assured payment of any compensation due to complainant without unreasonable delay; and hence satisfies the requirement of due process of law as clearly as if the ascertainment of compensation had preceded the taking" (251 U. S., at 238).

There can be no distinction between the taking of a contract right or a patent right or land. All are "property" and all are protected and in the same degree by the same constitutional principle. And this Court has recognized as of course that there is no distinction.

See the citation of *Crozier* vs. *Krupp* in *Bragg* vs. *Weaver;* the reference to *Bragg* vs. *Weaver* in *Hays* vs. *Port of Seattle;* the reference to all three of these cases in *Joslin Co.* vs. *Providence.*

The second decision of the New York Court of Appeals in the *Pauchogue* case (248 N. Y., 635, c. d., 278 U. S., 657) is discussed at some length (appellees' brief, pp. 34-6) and with a complete misunderstanding of the facts involved and the questions adjudicated. Thus, at page 35, counsel say that "it was shown at the trial that the amount of the Heckscher gift was more than the plaintiffs had been willing to accept at the outset of negotiations." The Pauchogue Land Corporation had never at any time been willing to accept $250,000 for the

property; in its complaint it alleged a value of $800,000 (see record on appeal, 248 N. Y., 635, at fol. 43); in its brief as appellant in the Court of Appeals (Point IV, p. 55), it contended that the testimony at the trial showed the value to be in excess of $1,000,000; its petition to this Court for certiorari (p. 4) claimed a value of upwards of $750,000. The Pauchogue Land Corporation was in fact offered the whole amount of the Heckscher gift, $262,000, and indignantly rejected the offer, as the record in the *Pauchogue* case makes wholly plain.*

Counsel say more than once (appellees' brief, pp. 35, 36), that "any substantial federal question left the [*Pauchogue*] case when the Court found the property not worth more than the moneys on hand." But there was no such finding by any court (see record on appeal, fol. 4501; 223 App. Div., 733; 248 N. Y., at 636).

On the contrary, the trial court, without submitting to the jury any question arising from the vast differences in the estimates of value, ruled as matter of law that the appropriation made after the Heckscher gift had been received was valid. And this ruling made as matter of law the Court of Appeals sustained, saying that "the property in suit has been lawfully appropriated" (248 N. Y., 636).

The Court of Appeals in this second decision wrote no opinion but simply cited and applied its earlier ruling in the same case in 243 N. Y., 15. But counsel are wholly wrong in saying that no constitutional question was involved. On the contrary, the determination by the trial court that as matter of law the presence or absence of funds actually sufficient was immaterial so

*The Pauchogue Land Corporation's predecessor in title had been willing to sell the property for $250,000 and this is doubtless the source of appellees' mistake.

long as the commissioners acted in good faith, left open the identical constitutional question which had been urged on the first appeal and which is urged in the case at bar. And this constitutional question the Pauchogue Land Corporation on its second appeal to the Court of Appeals and in its petition for certiorari and brief in this Court urged with the utmost elaboration and emphasis. The Court of Appeals in its second decision found a complete answer to the constitutional arguments in its first opinion. And the principle laid down in the first opinion that "the credit of the State may be pledged to meet the deficiency" is the principle that in fact has been applied in the determination of the Pauchogue Company's claim against the State. That company, after the failure of its certiorari application here, tried its claim in the Court of Claims. Asserting a value in its complaint of $1,468,000, it, in fact, recovered judgment in the sum of $275,000,—which was more than the $262,000 that Mr. Heckscher had made available and that the Commission had on hand. The credit of the State has in fact—as Judge Pound forecast—been "pledged to meet the deficiency."*

Counsel say (appellees' brief, p. 38) that *Rockaway Pacific Corporation* vs. *Stotesbury* (255 Fed., 345) "settles all the questions in the present suit."

It is indeed the only decided case to which appellees have ever been able to refer where it was thought by any judge that Article III, §21 of the New York Constitution was in any sense a limitation of the State's power of eminent domain,—a proposition clearly wrong upon principle, and upon the express definition of the eminent

*The decision of the New York Court of Claims was rendered on December 21, 1929.

domain power under the New York Constitution by Judge Vann in the *Adirondack Ry.* case (*supra*, pp. 10-13). All that can be said for the *Rockaway Pacific* decision we have said in our main brief (pp. 43-4),—that it is defensible by reason of the peculiarity of the statute there involved, which intentionally omitted the State's promise to pay the Court of Claims judgment.*

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*The decision in the *Rockaway Pacific* case did not go upon any question of the *Federal* due process requirement. There is no reason to doubt that all the three judges recognized the sufficiency under the Fourteenth amendment of an express pledge of the State's credit:—obviously, Judge Hough who sharply dissented; hardly less clearly Judge Rogers who cited *Crozier* vs. *Krupp* as settling the law in "the Supreme Court of the United States" (353); probably Judge Ward who declared the "decisions of the Federal Courts" inapplicable (p. 348) and the problem one to be determined by New York State decisions.

It was as matter of New York law that Judge Ward found invalid a statute which contained no pledge of the State's credit and which, as he put it, "goes no further in protection of the landlord than to provide the manner in which the amount of his compensation shall be ascertained" (pp. 348; see our main brief, pp. 43, 44).

While the result reached in the *Rockaway Pacific* case was likely enough correct in view of the intentional omission of the state's promise to pay for the land, some of Judge Ward's expressions concerning the State Court decisions were mistaken. His prime reliance is upon a dictum of Chancellor Walworth in *Bloodgood* vs. *Railroad Co.*, 18 Wend., 9, not adopted by the majority of the Court which reduced their conclusions to a formal "resolution" (pp. 77-78). In the leading case of *Chapman* vs. *Gates*, 54 N. Y., 132, the Court of Appeals in terms declared that Chancellor Walworth's declarations were "not really involved in the case" (145) and that "the principle was decided" the other way by Chancellor Kent in *Rogers* vs. *Bradshaw* (143). While in view of the *Adirondack Railway* case and Chancellor Kent's decisions in *Rogers* vs. *Bradshaw* and *Jerome* vs. *Ross*, Judge Ward was in error in thinking that the New York due process rule was, even at the time he wrote, in any respect different from the rule of this Court, it should be said that the principle of *Crozier* vs. *Krupp* was not by name adopted in the New York Courts until *Kahlen* vs. *State* was decided (223 N. Y., 383) and *Crozier* vs. *Krupp* cited (at 389,—a year after the decision in the *Rockaway Pacific* case).

IV.

Replying to Point III of appellees' brief (pp. 40-66).

At page 41 counsel say that $100,000 out of the $600,000 allocation was reserved for other land. There is nothing in the record to support the assertion. And see the wording of the allocation certificate (R., 55) discussed in our main brief, at pages 10, 12.

Counsel criticize (p. 41) Mr. White's statement (R., 79) that the Commission at the time of the entry and appropriation had available assets outside of the bond moneys "which I am informed and believe were of a value in excess of $500,000."

The criticism is groundless. The nature of this property as explained by Mr. White,—"moneys, securities and other properties"—shows that a precise statement of the amount on hand at the moment—such as might be given if the property consisted of a bank deposit—was here impossible.

At page 42 counsel assert that the power of entry and appropriation under section 59 of the Conservation Law, given to the Palisades Interstate Park Commission by section 761 of the Revised Conservation Law of 1928, was subject to the condition "when moneys have been *appropriated* therefor," and argue that the Long Island Commission had a greater license, since it was permitted to acquire lands from moneys on hand as well as moneys appropriated. The limitation which counsel thus seek to impose upon the Palisades Commission is found, as their footnote reference shows, in Section 50 of the Revised Conservation Law (see p. 22 of the appendix to our main brief). There is needed only a reading of

subdivision 2 of this section, with subdivision 30 of the same section (see again p. 22 of the appendix to our main brief) to understand at once that this is a limitation put upon the power of the conservation commissioner as an independent agency in the acquisition of land for the State, and that it is not intended that any part of section 50 shall operate as a limitation or restriction or diminution of the authority of the Palisades Interstate Park Commission. The misapprehension was fully discussed in our main brief at pages 40-42. It may however, be instructive to refer again to the opinion of Judge Vann in *People* vs. *Adirondack Ry. Co.* (160 N. Y., at p. 230), where the nature and general locality of the "forest preserve" is made perfectly clear.

The attempt to read Section 50 into Section 761 completely overlooks the history of the subject and the obvious intention of the Legislature. The Legislature could not have thought of limiting the Palisades Commission to "moneys *appropriated,*"—which is the limitation on the Conservation Commissioner in Section 50 and the only limitation even suggested. What possible object would the Legislature have in denying the Commission the use of those munificent gifts which had helped to make the great Palisades system possible? (See Record, p. 59.)*

On the same page (p. 42) counsel assert that the Palisades Interstate Park Commission is not, like the Long

*The Long Island Commission was not limited to "moneys *appropriated*" but to "moneys or property *on hand or* appropriated."

At the very moment of writing into the Conservation Law the provision giving the Palisades Commission the power of entry and appropriation, the State was successfully maintaining in the courts its right to use moneys obtained from a private source as the basis for entry and appropriation for park purposes (*Pauchogue* vs. *Long Island State Park Commission*).

Island Commission, given the power to acquire land by entry and appropriation from "moneys on hand."

This reference to the "power" of the Long Island Commission is in reality a reference, as the *Pauchogue* decision in 243 N. Y., made perfectly clear, to a statutory restriction and limitation upon the eminent domain power as it exists under the State Constitution and under the general provisions of section 59 of the New York Conservation Law. The Palisades Commission is given the entry and appropriation power under section 59 *without* these restrictions (see section 761 of the New York Conservation Law of 1928; appendix to our main brief, pp. 34, 23; main brief, pp. 5-6, 32, 40-2).

Appellees' argument (appellees' brief, pp. 42-67) in support of the contention that none of the bond moneys provided by the Referendum Act of 1924 could be used by the State Park Commission for the acquisition of land by entry and appropriation can be reduced to the following propositions: (1) That referendum laws cannot be changed or modified in respect of basic requirements by subsequent legislation; (2) that Section 761 of the Revised Conservation Law was not an amendment of the Palisades Park Act, and (3) that the reference to "Chapter 170 of the Laws of 1900, as amended" in the Bond Referendum Act could include only amendments to the Palisades Park Act up to the date of the Bond Act.

(1) For the proposition that referendum laws cannot be changed or modified by subsequent legislation there is cited only a decision of the Trial Term of the New York Supreme Court, *Half Moon Bridge Co.* vs. *Canal Board*, 91 Misc., 600 (appellees' brief, pp. 43, 58-60). Later decisions of the Appellate Division and the Court of Appeals establish that referendum acts are

amendable by the Legislature in matters which affect the details of the plan and the mode of execution, and thus do not change the central purpose of the project as approved by the People.

People ex rel. Jordan vs. *Wotherspoon*, 94 Misc., 419, aff'd 176 App. Div., 947;
Kibbee vs. *Lyons*, 118 Misc., 172, aff'd 202 App. Div., 562; aff'd 235 N. Y., 546.

In the *Jordan* case, the Legislature changed the location of a canal course specified in the referendum act as *north* of certain railways to one *south* of those lines; in the *Kibbee* case the Legislature struck out a spur for which the referendum act had made express provision. The Court sustained the enactment in each case.*

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*The opinion of the Appellate Division in the *Kibbee* case, which the Court of Appeals affirmed without opinion, is instructive:

> "We think the above act amending the Barge Canal Act was a lawful exercise of the legislative power lodged in the Senate and Assembly. Article 3, section 1, of the Constitution provides: 'The legislative power of this State shall be vested in the Senate and Assembly.' The legislative power rests exclusively in the Senate and Assembly; except so far as the Constitution itself has placed it otherwhere, the Senate and Assembly cannot release its power, nor delegate it to another. Our State Constitution contains no general provision for submitting acts of the Legislature to a referendum. The only sections of our Constitution which have a bearing here are sections 4 and 10 of article 7 above quoted, and they are intended to put restrictions upon the legislative power in respect to creating an indebtedness in behalf of the State and to limit the expenditure of State moneys borrowed to the single work or object distinctly specified in the referendum act. They put no other restriction upon the power of the Legislature to amend any act which has been approved by the votes of the people" (202 App. Div., at 566).

In the Court of Appeals in the *Kibbee* case, the unsuccessful appellants cited the same authorities (*Half Moon Bridge Co.* vs. *Canal Board*, 91 Misc., 600; *People ex rel. Hopkins* vs. *Board of Supervisors of Kings County*, 52 N. Y., 556; 561; *Rockaway Pacific Corp.* vs. *Stotesbury*, 255 Fed., 345, 348), which appellees here cite.

What the People approved at the general election of 1924 was not at all the proposition that the Palisades Interstate Park Commission should employ the condemnation process exclusively and not be permitted to use any of the bond money for land taken by entry and appropriation. What the People did approve was the general park plan. The question submitted and answered in the affirmative was,

> "Shall * * * 'An act making provision for issuing bonds to the amount of not to exceed fifteen million dollars for the extension and improvement of existing state parks and the establishment of new state parks and parkways in order to create a comprehensive and unified state park system for the promotion of the recreation, instruction and health of the people, and providing for a submission of the same to the people to be voted upon at the general election to be held in the year nineteen hundred and twenty-four' be approved?" (L., 1924, ch. 602, §7—appendix to main brief, p. 40.)

(2) The contention that Section 761 of the Revised Conservation Law cannot be called an amendment of the Palisades Park Act ignores the well understood and commonly accepted meaning of the term. "Amendment" is commonly and properly used in referring to new provisions included in revisions or codifications of the existing law on a given subject. (See cases cited in our main brief, at pp. 51-2.)

(3) Counsel cite and quote (appellees' brief, pp. 51-52) cases like *American Bank* vs. *Goss* (204 App. Div., 759, 760) and *Knapp* vs. *City of Brooklyn* (97 N. Y., 520). In these cases it is said to be "a well settled rule of interpretation of statutes" that where one law is incorporated by reference in a subsequent law, the reference is deemed

to include the law referred to with all its amendments then in existence, but not amendments subsequently made "unless a contrary intention is clearly manifested."

This rule might be applicable if in the Bond Referendum Act the words "as amended" had not been used in the reference to the Palisades Park Act. Those words are the "clear manifestation" of "a contrary intention,"—the intention to include future amendments.

Observe, for instance, the illustration drawn from the revised Conservation Law itself in our main brief (p. 53) where "as amended" can refer only to future amendments.*

At pages 46-47, appellees quote Section 662 of the revised Conservation Law as declaring that Chapter 16 of the Laws of 1926 is not "to be affected or impaired by this article." This general declaration, reiterating the provisions of the appropriation law of 1926, has no bearing upon a change made not in the appropriation law but in what had been the Palisades Park Act and in what continued to be the portion of the Conservation Law concerned with the powers and duties of the Palisades Commission. And the appropriation act of 1926 thus reiterated, contained the same reference to the Palisades law "as amended" as did the referendum act itself (see Appendix to our main brief, p. 45).**

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*The Court will not have overlooked that appellees' counsel make absolutely no attempt to explain this use of the phrase in this particular sense by the Legislature.

**The purpose of the provision in Section 662 against impairing or affecting the provisions of the 1926 law concerning the acquisitions of land by the park commissions is definitely established by the history of the subject:

After the 1924 referendum had been approved, there was, during the year 1925, disagreement between the Governor and the Legislature

(*Footnote continued on next page.*)

The sole objection raised by the bill to the reappropriation act of 1928 is that it "fails to comply with the requirements of said section 21 of Article III of the Constitution of the State of New York *in that it fails to specify the object to which the sum appropriated is to be applied*" (R., 8).

Counsel now announce (appellees' brief, p. 63) that they object also on various other grounds. It is, however, the case made by the bill that must determine the basic questions of jurisdiction, legal sufficiency and inadequacy of legal remedy.

People ex rel. Hopkins vs. *Board of Supervisors of Kings County*, 52 N. Y., 556, frequently cited by the appellees (see, e. g., 63) has no bearing. That case had to do with original appropriation, not re-appropriation. Many things were confused in the same act,—appropriations to pay deficiencies for unspecified purposes under laws merely referred to by year and chapter; deficiencies in the canal debt sinking fund; the "present acknowledged deficiencies" and the "estimated liabilities of the General Fund." The amount of "the present acknowl-

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(*Footnote continued from p.* 34.)

concerning the terms upon which the bond moneys, after being appropriated, were to be made available to the park commissions. The Legislature in 1925 wished to subject the park commissions to the Land Board and passed two measures to this effect, both of which the Governor vetoed. In 1926 this disagreement was composed and the Legislature, as one of its first acts, passed Chapter 16 of the laws of that year making the appropriations out of the bond moneys and subjecting the commissions merely to the requirement that the Governor and the chairmen of the two financial committees of the Legislature give their approval. The purpose of the reference in Section 662 of the revised Conservation Law was simply to insure that the compromise thus effected in 1926 should not be disturbed and that allocations of bond moneys under that law should continue to require the joint approval of the Governor and the two chairmen.

edged deficiencies," the amount of "the estimated liabilities of the General fund," what the debts were for,—were not stated. In an attempt to make diverse appropriations seem single, they were referred to as "*an* appropriation." The Court said (p. 561):

> "The appropriations are in fact many, and their objects many and diverse, and they cannot be reduced to one, and the objects and works made a unit by the mere dash of a pen or the construction of a sentence."

In the 1928 reappropriation act, the object is specified, the amount is specified. Appellees' contention, therefore, amounts to this: they claim the right to substitute their judgment as to the amount of itemization for that of the Legislature.*

The amount of itemization or detail is a matter for the Legislature to determine (cf. *Cooley,* Constitutional Limitations, Eighth Ed., 300). The Court of Appeals in a very recent opinion (*People* vs. *Tremaine,* 252 N. Y., 27) recognized the discretion of the Legislature in this field, writing to the very case of a statute of original appropriation.

See also the holding in *People* vs. *Home Insurance Co.,* 92 N. Y., 328, 335-337, that where the State constitution provides "that a tax law shall distinctly state * * * the object to which it is to be applied" a statement of the object as "the payment of the ordinary and current expenses of the State" will be upheld as sufficient.

It is thought by appellees that the Palisades Commission, by obtaining the approval of the Conservation Com-

*That the Legislature thinks differently in the matter appears from legislative construction with reference to another reappropriation referred to in our brief, page 56,—not commented upon by the appellees.

missioner under section 662 of the Conservation Law (see appendix to main brief, at p. 27) "discarded the allocation of $600,000 it had obtained on September 29" (appellees' brief, p. 65).

There is nothing in the provisions of section 662 itself, or in the allocation requirement of section 8 of the 1926 Appropriation Act (see appendix to main brief, at p. 51), that would suggest such a result. On the contrary, by obtaining the approval of the Conservation Commissioner under section 662, the Palisades Commission complied with the last formality necessary in order to make the general public funds of the State available for the payment of all or any part of the Court of Claims judgment (main brief, pp. 7, 10, 11).

V.

Replying to Point V of appellees' brief (pp. 68-74).

Virtually all of appellees' contentions with respect to the sufficiency of the allegations of its bill to present its supposed federal question, have appeared on earlier pages of its brief and been already answered.

Counsel state (appellees' brief, p. 71) that

> "Exhibit F to the bill shows that the only personal property not a part of the plant and therefore of the realty are an automobile truck and office furniture and fixtures."

But the exhibit itself by no means shows that this was the fact. It is impossible to gather from it (R., 33) how much of the machinery was detachable and removable and how much was permanently affixed to the realty.

Appellees criticize (p. 72) our statement—made upon the authority of Chief Judge Cullen in *County of Albany* vs. *Hooker* (204 N. Y., 1, 19)—that only the Attorney General can challenge the constitutional sufficiency of a statute of appropriation. Their criticism is mistaken.

Chief Judge Cullen in the *County of Albany* case ruled that even an appropriation statute which he expressly assumed to be clearly invalid could be assailed only by an action in the name of the People of the State. And only the Attorney General can bring such an action (*Executive Law,* Section 62, subd. 1; *People* vs. *McClellan,* 118 App. Div., 177, affirmed on opinion of Ingraham, J., in Appellate Division, 188 N. Y., 618).

VI.

Replying to Point VI of appellees' brief (pp. 74-86).

At the bottom of page 75 the argument seems to be that section 662 of the Conservation Law "expressly excluded" the possibility of obtaining the Conservation Commissioner's approval when any bond issue money was to be used in payment for the particular property. The section contains no such prohibition, nor anything else to warrant the conclusion. It makes the approval of the Conservation Commissioner one of the steps to be taken where funds other than bond moneys are to be used in payment, but it nowhere provides that that approval cannot properly be obtained for an appropriation which is to be paid in part out of moneys derived from the bond issue (see main brief, pp. 10-11 and appendix, p. 27).

The assumption underlying the arguments with respect to section 662 seems, however, to be that by complying with the formalities necessary for the use of $600,000 of the bond issue money and also with the formalities necessary in order to make the general funds of the State available, there was something inherently illegal or at least tricky and deceptive (appellees' brief, pp. 75-76). The suggestion is a preposterous one, based altogether upon the plainly mistaken idea that the allocated bond issue money could be used only to pay for land taken by condemnation proceedings. This, as we have shown (main brief, pp. 49-54) is a proposition for which no support can be found in the decided cases or upon principle.

At pages 77, et seq., appellees seek to meet appellants' contention that the action is, in reality, one in ejectment (main brief, pp. 68, 69).

They assert mistakenly that the discussion is foreclosed because of the withdrawal of assignment of error No. 4. They overlook assignment No. 5 (Record, p. 99): "The Court erred in holding that this action is not essentially an action for ejectment."

Appellees do not attempt to answer the controlling decisions of this Court analyzed at pages 66-9 of our main brief, but resort to other cases which, however, have no bearing:

Litchfield vs. *Bond* (see *supra*, pp. 21-22) involved an ordinary injunction against continuing trespasses,—no claim of title.

Flood vs. *Van Wormser*, 147 N. Y., 284, dealt wholly with the ordinary preventive injunction against a threatened injury.

Baron vs. *Korn*, 127 N. Y., 224, was again an injunction suit to restrain continuing trespasses. The opinion in *West Point Iron Co.* vs. *Raymert*, 45 N. Y., 703, does not indicate whether the owners had or had not been dispossessed. In each of these cases the court held (*Baron* case, p. 229; *West Point Iron* case, p. 705) that the right to a jury trial was not claimed in time.*

Bloomquist vs. *Farson*, 222 N. Y., 375, is cited (appellees' brief, pp. 79-80) for the contention that the adequacy of the legal remedy must be raised by answer. But that case held (see especially opinion of the lower court, 170 App. Div., 64, 65) that it was too late to raise

*In the New York courts as in the Federal courts, if defendants claim title they are entitled to have that issue tried by a jury (*City of Syracuse* vs. *Hogan*, 234 N. Y., 457; *Pouchogue Land Corporation* vs. *Long Island State Park Commission*, 125 Misc., 809).

the defense by motion to dismiss at the end of the plaintiff's case where it had not been pleaded. The question here was raised by a motion to dismiss,—*at the very first opportunity* (R., 79-81, 86).

The Federal cases cited by appellees do not help them:

In *Pokegama Sugar Co.* vs. *Klamath River Co.*, the court explained (96 Fed., 34, at p. 56) that the action of ejectment was not adequate there because in that case "complainant asserted certain equities to defeat respondent's right of possession * * *. But in an action of ejectment in the United States Court, where the legal title prevails, such equities could not be considered."

Slaughter vs. *Mallet Land Co.*, 141 Fed., 282, was an action to restrain a trespass by force "resulting, at best, in a disputed joint occupancy" (p. 288).

Percy Summer Club vs. *Astle*, 145 Fed., 53, was an unsuccessful action to restrain a trespass against an alleged exclusive right of fishing.

Love vs. *Atchison, T. & S. Ry. Co.*, 185 Fed., 321, was an action to enjoin a confiscatory rate.

VII.

Replying to Point VII of appellees' brief (pp. 86-88).

Appellees profess to believe "that no funds had been appropriated for a taking in the manner chosen by the Commission" (p. 87).

This is wrong: the uncontradicted evidence is that quite outside the bond moneys—outside the pledges of the state's whole funds—the Commission "on October 11, 1928 (when the said property was appropriated), had on hand" "moneys, securities and other property which could be lawfully used for the acquisition of lands for park purposes in any manner" "of a value in excess of $500,000" (R., 79).

And this fact would by itself and if every preliminary question of New York law were decided in appellees' favor—if the Commission had been subjected to a statutory limitation to funds on hand as they were not; if the use of the bond moneys for entry and appropriation had been prohibited, as in fact it was permitted; if the reappropriation of the bond moneys had been void as in fact it was valid,—this fact, would by itself be decisive against appellees' case under the law of the state whose enactments are in question. For under that law even with respect to a commission under a statutory duty to have funds on hand the test is simply one of "good faith" (*Pauchogue Land Corporation* vs. *Long Island State Park Commission*, 243 N. Y., 15, 27; main brief, p. 35). In the absence of a showing of bad faith an entry and appropriation must stand. "Infallibity" will not be demanded "of the public officials in estimating the true value of property taken by them for state purposes" (*ibid*). And it is settled that in the absence of a showing of bad faith the landowner may not have an interlocutory injunction (*Flagg* vs. *Long Island State Park Commission*, N. Y. L. J., August 3, 1926; *Rasweiler* vs. *Long*

Island State Park Commission, N. Y. L. J., April 29, 1927),—precisely as in the absence of such a showing he must be denied final relief (*Pauchogue Land Corporation* vs. *Long Island State Park Commission*, 248 N. Y., 635; *Flagg* vs. *Moses*, 132 Misc., 494, 225 App. Div., 887, leave to appeal denied by the Court of Appeals, April 23, 1929; *Rasweiler* vs. *Long Island State Park Commission*, N. Y. L. J., July 9, 1927).

In the case at bar there is not a syllable of reflection upon the good faith of the Commission's belief that the real property they appropriated (R., 72)—real property assessed at $15,000 (R., 60)—was worth no more than the moneys on hand.

CONCLUSION.

Replying to pages 88-90 of appellees' brief.

Appellees recur in conclusion (p. 88 of their brief) to the fallacy that section 50 of the Conservation Law has something to do with the entry and appropriation power of the Palisades Interstate Park Commission, although neither section 761 which gives that power, nor section 59 which prescribes the procedure, makes any reference to section 50.

At page 89 reappears the suggestion that what should be required of the Palisades Interstate Park Commission here is the "deposit" of "the value put upon the property by the owner," although the provision for such a deposit formerly contained in section 24 of the Condemnation Law was done away with in 1923 (see pp. 22-23, *supra*).

Appellees challenge our concluding statement (main brief, p. 82) that the entry and appropriation procedure, of which Section 59 of the New York Conservation Law is but a typical modern illustration, had its origin in New York in the Erie Canal Act of 1817. They triumphantly point to the fact that under that Act the fee of land taken did not vest in the State until compensation had been paid and to a statement to this effect by Chancellor Kent in *Rogers* vs. *Bradshaw* (20 Johns., at 741).

The attempted distinction, however, is not a real one and will not bear analysis. For the distinctive and valuable features of entry and appropriation are (1) from the State's point of view, the right to take possession in advance of the payment of compensation, and (2) from the owner's point of view, the fact that the right

to compensation becomes vested upon service of the notice of appropriation, and the State cannot thereafter change its mind and withdraw.

(1) The practical advantage to the State is, of course, the right to take and use the property for the intended public purpose without the delay incident to the determination and payment of compensation. And it was not because the Erie Canal Act of 1817 was thought to vest title in the State immediately upon the entry of the canal officials but because it gave to the canal officials the right of immediate entry,—in advance of payment of compensation—that it has always been referred to as the pioneer statute.* We quote for a second time Judge Vann's statement in *People* vs. *Adirondack Railway Co.* (160 N. Y., at 241) where, referring to the 1817 and subsequent canal acts, he says:

> "All the canals of the state were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the

*So too *Cherokee Nation* vs. *Southern Kansas Ry.*, 135 U. S., 641 (where the condemnation statute permitted entry before payment, but reserved title in the owner until compensation was paid) is cited as the pioneer decision in cases like *Sweet* vs. *Rechel* (159 U. S., at 402), *Backus* vs. *Fort Street Union Depot Co.* (169 U. S., at 588), *Williams* vs. *Parker* (188 U. S., at 502-3), *Crozier* vs. *Krupp* (224 U. S., at 306) discussed in Point I of our main brief (pp. 19-30).

> condemnation, except that the damages when ascertained were paid by the state. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they received the amount awarded by the appraisers, and unless they filed their claims within the period mentioned they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, sustained, some directly and others indirectly, the constitutionality of this legislation."

And from this review of the Canal Acts Judge Vann proceeded directly to the conclusion that the Adirondack Park Act (in which—as in its successor the Conservation Law—it was provided that title should pass to the State when notice of entry and appropriation was served) was

> "not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock* vs. *Young*, 4 Wend., 647; *Jerome* vs. *Ross*, 7 Johns. Ch., 315; *Rogers* vs. *Bradshaw*, 20 Johns., 735.)"*

(2) For the owner the advantage is no less clear, under the entry and appropriation practice, and that whether title vests immediately upon the entry and ap-

*Counsel for the *Adirondack Railway*, appealing to this court from Judge Vann's decision, commented at the end of his brief upon the reference we have quoted to the "adjudications made many years ago and acquiesced in ever since" which "sustained, some directly and others indirectly, the constitutionality" of the appropriation statutes. He conceded that the "reported" decisions of the New York Courts to which Judge Vann thus referred were over two hundred in number. This concession by counsel contesting the New York rule has peculiar significance in connection with the decision by the Court below that the Conservation Law was actually void under the *New York* due process and just compensation clauses.

propriation or only upon the payment of compensation. For in either event, "the appropriation is deemed complete from the time of the service of the notice which is made conclusive evidence of the taking and is binding on all concerned. When the lands are appropriated, the owners are entitled to have their damages assessed and paid in money" (*Kahlen* vs. *State of New York,* 223 N. Y., at 388).

The *Kahlen* case perfectly shows this advantage to the landowner; for the statute there involved did not in terms declare when title was to pass to the State. And this omission Judge Pound, in holding that the State could not recede from its position once the notice of entry and appropriation had been served, declared to be wholly immaterial. He said (at p. 389):

> "The act contains no clause expressly declaring at what state of the proceedings the owner's title is divested, and it has been held in this state, that under the provisions of chapter 262, Laws of 1817, 'the first efficient statute under which our great system of internal improvements was commenced' (15 Barb., 627, 642), the fee did not vest in the state until the payment of the compensation. (*Rexford* vs. *Knight,* 11 N. Y., 308, 314.) The reason for so holding was that the statute so provided—not that the state was thus constitutionally restricted. The case held also that the *appropriation* was complete and constitutional although evidenced only by actual occupation of the lands for canal purposes without prior payment of compensation."

The great proposition established by the *Kahlen* case is that once the state enters—even if the passage of title is deferred as under some of the earlier statutes it was—"the right to compensation became vested. The elementary requirements in favor of property rights in-

flexibly forbid the state to change its sovereign mind" (223 N. Y., 391).

"The legislature"—as Judge Pound put the matter in this fundamental New York opinion which cites *Crozier* vs. *Krupp*, and which Judge Pound himself cited when in the first *Pauchogue* opinion he came once more to write of the constitutional question—

> "is powerless to say that after the taking is complete, there can be no recovery" (223 N. Y., at 390).

No injunction in a case of this sort "ought to be granted unless in a case reasonably free from doubt" (*Ex parte Young*, 209 U. S., 123, 166; *Cavanaugh* vs. *Looney*, 248 U. S., 453, 456-457). The principle, clear in any case, is clearest in a case where the preliminary questions of state law are questions which concern the "sovereign power of eminent domain" (*People ex rel. Horton* vs. *Prendergast*, 248 N. Y., 215, 224, appeal dismissed for want of substantial federal question, 278 U. S., 579). For questions relating to that power have from the beginning been decided by the New York Courts in favor of that power (*Lyon* vs. *Jerome*, 15 Wend., 569, 574,—an early decision by Nelson, C. J., shaping the law of appropriation; *People* vs. *Adirondack Railway*, *supra*).

But there is no doubt. The basic issue in the case is an issue that in the words of this Court is "settled" (*Bragg* vs. *Weaver*, 251 U. S., at 62), "long settled" (*Joslin Co.* vs. *Providence*, 262 U. S., at 677), an issue that Chief Judge Cardozo has in so many words declared to be no longer in the jurisdictional sense a "substantial" issue. Because that issue is settled, appellees' minor contentions become as irrelevant as they are baseless.

The Court will not have overlooked the unreality of appellees' entire case. Appellees have no right—least of all under the Federal Constitution—that their property shall not be taken by the State for a public purpose. Their only right is that if that property is taken, they shall receive its value. There is not the least doubt in anyone's mind that just this will happen. There is no doubt in the minds of appellees. For the very point of their law suit is that the State officials are accepting the appropriation of the property as valid. The conclusion is inevitable that the landowners will be awarded and paid just compensation,—and that is their only right. Every one so situated has had his compensation in the past. Every one will have it in the future. Appellees cannot fail to have it. But what appellees want is not any further assurance of compensation,—any better assurance than an express pledge of the general credit of the State of New York. What they want and by this lawsuit seek, is somehow to prevent the State from going ahead with the established procedure by which land is taken and compensation given.

The interlocutory decree should be reversed, and the bill dismissed.

Respectfully submitted,

WALTER H. POLLAK,
Counsel for Appellants, J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park.

JAMES GIBSON,
Second Assistant Attorney General of New York,
Counsel for Appellants, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York.

WALTER H. POLLAK,
CARL S. STERN,
RUTH I. WILSON,
On the Brief.

OCT 2 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1929.

No. 336

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MacDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

ANSWER TO MOTION TO ADVANCE.

HENRY J. HEMMENS,
Solicitor for Appellee,
SPARKILL REALTY CORPORATION,
43 Cedar Street,
New York City, N. Y.

CULLEN & DYKMAN,
Solicitors for Appellee,
STANDARD TRAP ROCK CORPORATION,
177 Montague Street,
Brooklyn, N. Y.

WILLIAM N. DYKMAN
JACKSON A. DYKMAN
Of Counsel.

PRESS OF BYRD RICHARDSON DARBY & ROSE, INC., 119 CEDAR ST., NEW YORK

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1929.

No. 336.

J. Du Pratt White, Franklin W. Hopkins, Edward J. Partridge, George W. Perkins, Jr., Frederick C. Sutro, George T. Smith, William Childs, W. Averell Harriman, Charles W. Baker and Frederick H. Osborn, constituting the Board of Commissioners of the Palisades Interstate Park, Hamilton Ward, as Attorney General of the State of New York, and Alexander MacDonald, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

Sparkill Realty Corporation and Standard Trap Rock Corporation,

Appellees.

Come now Sparkill Realty Corporation and Standard Trap Rock Corporation appellees herein and join in the motion of appellants to advance.

By so joining in the motion appellees admit none of the allegations of the petition save as stated in the affidavit of W. Butler Duncan, hereto attached and made a part hereof.

WHEREFORE, appellees respectfully pray this honorable Court the motion to advance this case be granted and the appeal advanced to such early date as may to the Court seem advisable.

HENRY J. HEMMENS,
Solicitor for Appellee,
Sparkill Realty Corporation,
43 Cedar Street,
New York, N. Y.

CULLEN & DYKMAN,
Solicitors for Appellee,
Standard Trap Rock Corporation,
177 Montague Street,
Brooklyn, N. Y.

WILLIAM N. DYKMAN,
JACKSON A. DYKMAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 3[illegible].

J. DU PRATT WHITE, FRANKLIN W. HOPKINS, EDWARD J. PARTRIDGE, GEORGE W. PERKINS, JR., FREDERICK C. SUTRO, GEORGE T. SMITH, WILLIAM CHILDS, W. AVERELL HARRIMAN, CHARLES W. BAKER and FREDERICK H. OSBORN, constituting the Board of Commissioners of the Palisades Interstate Park, HAMILTON WARD, as Attorney General of the State of New York, and ALEXANDER MACDONALD, as Commissioner of the Conservation Department of the State of New York,

Appellants,

against

SPARKILL REALTY CORPORATION and STANDARD TRAP ROCK CORPORATION,

Appellees.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

W. BUTLER DUNCAN, being sworn, says: I am and at all times since its incorporation have been president of appellee, Standard Trap Rock Corporation. I have read

the petition of appellants upon this motion and respectfully state to this honorable Court:

This suit was brought to restrain appellants from enforcing the provisions of an act of the legislature providing for the taking of property for the Palisades Interstate Park by entry and appropriation. In the absence of funds to pay an award therefor such a taking is alleged (R., 9, 10) and has been found to be unconstitutional (R., 82).

A court convened pursuant to Section 266 of the judicial code has granted an interlocutory injunction and denied appellants' motion to dismiss the bill (R., 81) and a motion for a stay pending this appeal.

An opinion by Manton, Circuit Judge, in which Goddard and Bryant, District Judges concur, states the facts and conclusions of the court in full (R., 87).

Inasmuch as the record has been printed no further reference thereto will be made than is necessary to a statement of the reasons of appellees for joining in the present motion.

On October 18, 1927 appellees were each notified in writing by the attorney for appellant Board of Commissioners that their counsel had been instructed to take no steps for the condemnation of their property (Exhibits 2 & 3 to affidavit of White (R., 75, 76).

Thereafter and prior to October 11, 1928, the date of the notice mentioned in appellants' petition, appellee Standard Trap Rock Corporation, in reliance on the aforesaid statement (R., 5) had spent and incurred contractual obligations for construction and equipment of its plant nine hundred twenty-two thousand six hundred ninety-nine and 85/100 ($922,699.85) dollars (R., 6, 32, 43).

Said appellee has issued stock in the sum of about seven hundred fifty thousand ($750,000) dollars and has been able to earn no return or pay any dividends (R., 44).

The fair market value of the property has been estimated by a competent engineer to be four million ($4,000,000) dollars (R., 47).

The only statement as to value made on behalf of appellants is in the affidavit of J. Du Pratt White:

> "I have been advised by our counsel and believe that the value of the property is, as such, not an issue in this litigation,—that the value is to be fixed in the only court in which the State has consented to have a binding adjudication against it—the Court of Claims. In the circumstances, the Commission—though it denies plaintiffs' estimates of value and in the Court of Claims will challenge the figures now presented on behalf of the plaintiffs—will confine itself to stating the conclusion it reached at the time it appropriated.
>
> "All of the members of the Commission were familiar with the property and had visited it at one time or another; many of them had visited it shortly before the appropriation; I have been familiar with the property for forty years and had gone over it on many occasions, some of them just before the appropriation. The Commissioners, at the time of the appropriation, came to the conclusion relying upon the experience of the Commission in connection with the acquisition of numerous properties including quarries, the advice of their staff and of other technical experts and the data and reports in their possession that the property was worth less than $600,000, and that the obligation of the State would not exceed that sum. The Commission thereupon sought and obtained an allocation from the bond issue moneys of $600,000 (see Exhibit G attached to the plaintiffs' moving papers)." (R., 62).

As stated in the appellants' petition on this motion (pp. 4, 5) Standard Trap Rock Corporation had made extensive preparations for the commencement of its quarrying operations and in October, 1928, was about to begin excavation.

The annual capacity of the plant is seven hundred fifty thousand (750,000) cubic yards for which a market is assured at an annual profit of five hundred thousand ($500,000) dollars (R., 37). This is nowhere denied.

Appellees regained their property in June 1929. To complete and operate the plant a dock is necessary.

The state department of public works, being the only state agency charged with such matters, has approved plans for a dock and issued its permit for the erection thereof.

One of the appellants, Hamilton Ward, as attorney general, is a member ex officio of the so called state land board which I am informed by the solicitors for my company and therefore allege has no jurisdiction over docks or any subject connected with this suit.

Upon application to the War Department for approval of the plans for said dock I am informed said Ward has requested the board of officers charged with such matters to withhold action until the determination of this appeal, thereby in effect seeking a stay of the order from which he appeals although a motion by appellants for such stay was denied by the Court below. No approval by the War Department has been given and until its approval is received appellees are in effect stayed pending the determination of this appeal.

The allegations of paragraph 2 of the grounds stated in the petition for advancement (p. 9), to the effect that no requirement exists in any of the New York statutes providing for the exercise of the right of eminent domain for park purposes that there shall have been appropriated prior to the exercise of such right an amount reasonably certain to cover any award that may reasonably be made, are denied. It is stated by appellants that the doubt cast by the decision in this case upon the constitutional validity of the "customary method" of the Conservation Department and the various park commis-

sions under it must virtually suspend the use of the method until this appeal is determined. The attention of the Court is directed to Section 50 of the Conservation Law of the State of New York, as amended by Chapter 242 of the Laws of 1928, Section 5, being the statute upon which these appellants rely, the opening paragraph of which is as follows:

> "50. Powers and duties of the department relative to lands and forests. The conservation department shall, for the purpose of carrying out the provisions of this article, have the following powers, duties and authority to be exercised through or by the division of lands and forests:
>
> * * * * * *
>
> 2. Have power to establish, acquire, control and manage other state parks and parkways in the forest preserve counties, and in the counties of Albany, Jefferson, Montgomery, Schenectady and Schoharie, and to acquire lands for such purposes *when moneys have been appropriated therefor.*" (Italics supplied.)

Each and every contention of the appellants has been rejected by the Court below upon the motion for an interlocutory injunction in a considered opinion (R., 87).

At least three months will be required to complete the plant rendering it impossible to make contracts for the coming season according to the custom of the trade. Standard Trap Rock Corporation has therefore been subjected to a loss of two years' profits or approximately one million ($1,000,000) dollars (R., 37).

It is vital to appellees that this suit be determined as soon as possible. As stated in the affidavit of White, president of appellant Board of Commissioners, the questions involved are almost wholly questions of law (R., 57). The record has been printed and the case having

been already fully briefed in the Court below may be argued at any time which is convenient to this Honorable Court.

WHEREFORE, deponent prays this honorable Court that this appeal may be advanced to be argued at the earliest possible date consistent with the convenience of the Court.

W. BUTLER DUNCAN.

Sworn to before me this
25th day of September, 1929.
EDITH M. BROWN
Notary Public, Kings County No. 12
Certificate Filed in New York Co. No. [redacted]44
New York Co. Register No. 0-59
Commission Expires March 30, 1930

(Seal)